Baker McKenzie.

Hong Kong Employment Law Update

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Case Reviews

Defrauded employer not entitled to exemplary damages

Promo International Limited v Chae Man Tock and Chow Ting Hei (2018)

An employer, Promo International Limited (**Promo**), was successful in claiming damages from two former employees after they fraudulently inflated supplier prices and demanded commission from suppliers. The Court of First Instance (**CFI**) held that both Mr Chae and Ms Chow were employees of Promo and therefore owed a duty of good faith towards Promo. This duty of good faith had been breached and Promo was entitled to damages to compensate for the harm caused by the inflated prices and forced commissions (compensatory damages amounted to around HK$ 7,001,068). However, the CFI held that Promo was not entitled to the exemplary damages as Mr Chae and Ms Chow's actions were "not the worst of their kind" and that Promo as a company could not suffer direct physical or mental injury. Compensatory damages was adequate to punish and deter Mr Chae and Ms Chow for their conduct. The CFI held that the trial was unnecessarily lengthened by Mr Chae and Ms Chow's conduct and ordered them to pay Promo's costs of the trial from August 2017 until conclusion of the trial on an indemnity basis. Separately the employees were both criminally convicted of fraud and sentenced to 3 1/2 years imprisonment.

Employee sex discrimination claim fails

Tan Shaun Zhi Ming v Euromoney Institutional Investor (Jersey) Ltd (2018)

In *Tan Shaun Zhi Ming v Euromoney Institutional Investor (Jersey) Ltd (2018)* the employee's sex discrimination claim was unsuccessful as he failed to show that his dismissal was due to his gender and that he would have been treated differently if he had been a woman. The District Court dismissed the employee's claim, ruling that he was validly dismissed by the employer making a payment in lieu of notice.

Facts

The employee, Mr Tan, was accused of sexually harassing a female colleague during lunch at a restaurant. His employer, Euromoney Institutional Investor (Jersey) Ltd (**Euromoney**), conducted an investigation into the allegation and interviewed several witnesses. After concluding its investigation, Euromoney decided to dismiss Mr Tan immediately by making a payment in lieu of notice.

Mr Tan brought a claim for sex discrimination, arguing that he was unlawfully dismissed because he was a male and his accuser was female, claiming that Euromoney would not have treated a female employee the same way. Mr Tan also argued that Euromoney did not fairly investigate the accusations, as Mr Tan was not given an opportunity to hear what witnesses had said, or produce any of his own witnesses.

Euromoney argued that Mr Tan's employment had been lawfully terminated in accordance with his employment contract and there was no evidence of discrimination.

District Court decision

The District Court (**Court**) held that Mr Tan had produced no direct evidence to show he was dismissed on the grounds of his sex or that Euromoney would not have dismissed a female employee in similar circumstances. The Court cannot infer discrimination, it must be proved by evidence. Even if, hypothetically, an employee had been treated unreasonably or unfairly during an investigation process, that does not mean the employee has been discriminated against under the Sex Discrimination Ordinance.

Mr Tan had been employed for less than two years and so was not entitled to be provided with a "valid reason" for his dismissal under the Employment Ordinance. Euromoney had the right pursuant to Mr Tan's employment contract to dismiss him by giving one month's notice or by making a payment in lieu of notice. The District Court did not comment on whether the investigation had been unfair, but focused on the fact that an inference of sex discrimination cannot be drawn simply from the fact that the claimant happens to be male or from the fact that the employer may have acted unreasonably or unfairly during the investigation.

Takeaway points

- Sex discrimination will not be inferred by a Court - concrete evidence is required.
- Making a payment in lieu of notice is less risky than summary dismissal, as the burden for proving the right to summarily dismiss is high (see more on this issue below).
- Investigations should be carried out in a fair and reasonable manner to minimise the risk of claims.

Employee mistake did not warrant summary dismissal

Cheung Chi Wah Patrick v Hong Kong Cement Co Ltd (2017)

In *Cheung Chi Wah Patrick v Hong Kong Cement Co Ltd (2017)* the CFI held that an employer was not justified in summarily dismissing an employee for gross misconduct, where the employee mistakenly applied for an incorrect amount of shares in a company on behalf of his employer's parent company. The mistake was rectified but could have resulted in a breach of the Hong Kong Stock Exchange Listing Rules.

Facts

The employee, Mr Cheung, was employed as a Financial Controller of Hong Kong Cement Co Ltd. Hong Kong Cement was wholly owned by TCC International Holdings Limited (**TCCIH**). Mr Cheung was also appointed Company Secretary and Financial Controller of TCCIH. TCCIH had two major shareholders, TCC International Limited (**TCCIL**), which owned 56.49% of TCCIH's shares, and Chia Hsin Pacific Limited (**CHPL**), which owned 15.48% of TCCIH's shares. The remaining shares in TCCIH (28.03%) were publically owned. Under the Listing Rules, at least 25% of TCCIH shares must be held by the public.

To raise funds, TCCIH proposed to issue a certain number of rights shares. Shareholders could make an initial application for rights shares and apply for any unsold rights shares (**Excess Rights Shares**). Mr Cheung was instructed to assist TCCIL in determining how many Excess Rights Shares TCCIL could apply for without breaching the Listing Rules. TCCIL had made an irrevocable undertaking to the underwriters of the rights issue that TCCIL would not cause the public holding of TCCIH's issued share capital to fall below 25% (and therefore breach the Listing Rules).

Mr Cheung sought legal advice on the issue following his supervisor's instructions. However, Mr Cheung honestly misunderstood the legal advice which was poorly provided to him over the phone. Mr Cheung mistakenly applied for the incorrect number of Excess Rights Shares on TCCIL's behalf, which would have caused the public holding of TCCIH's issued share capital to fall below 25% and breach the Listing Rules.

TCCIL's management had to negotiate with the underwriters to be released from their undertaking and sell shares to maintain the 25% public holding.

Mr Cheung was subsequently summarily dismissed on the ground of serious misconduct.

Under the Employment Ordinance, an employer can summarily dismiss an employee if the employee:

- willfully disobeys a lawful and reasonable order;
- misconducts himself, such conduct being inconsistent with the due and faithful discharge of his duties;
- is guilty of fraud or dishonesty;
- is habitually neglectful in his duties; or
- could be dismissed without notice on any other ground under common law.

Labour Tribunal

Mr Cheung commenced proceedings in the Labour Tribunal for wrongful termination, claiming wages in lieu of notice and an end of year payment.

Hong Kong Cement argued that Mr Cheung had committed gross negligence in carrying out his duties leading to serious consequences as TCCIH could have breached the Listing Rules. His breach of duty was unacceptable given the senior positon of Mr Cheung and his 15 years of experience.

The Labour Tribunal found in favour of Mr Cheung and he was awarded wages in lieu of notice (HK$ 136,260) and an end of year payment (HK$ 61,712).

Hong Kong Cement appealed to the Court of First Instance (**CFI**).

CFI Decision

The CFI dismissed the appeal and held that:

- Mr Cheung had honestly misunderstood and incorrectly relied on the legal advice. Although Mr Cheung was an experienced senior employee,

he was not a trained legal professional and the advice he received was complex and poorly explained.

- An employee's explanation as to why he or she has committed misconduct is relevant in deciding whether the employee's misconduct is "inconsistent with the due and faithful discharge of his duties"(one of the grounds for summary termination under the Employment Ordinance).
- Mr Cheung acted faithfully in discharging his duties and followed instructions from his superiors by seeking legal advice. The fact that he misunderstood this legal advice does not amount to neglect of his duties.
- Apart from serious cases of neglect of duty or breach of confidence or incompetence, an employer looking to summarily dismiss an employee has to show that the employee intended not to be bound by the essential terms and conditions of his/her employment contract.

Takeaway points

- Employers should exercise caution before deciding to summarily dismiss an employee and be mindful of the high threshold mandated by case law. A serious mistake or oversight may not be enough to warrant summary dismissal.
- Employers should investigate why the employee committed the misconduct in question and any explanation offered by the employee should be considered.

Employer breached employment contract in failing to allow employee to subscribe for share options

Lau Tin Cheung v Tianjin Development Holdings Limited (2017)

Tianjin Development Holdings (**TD**) failed to offer an employee, Mr Cheung, an option to subscribe for shares in TD upon completion of Mr Cheung's probation period, even though this obligation was explicitly set out in Mr Cheung's employment contract. TD was ordered to pay Mr Cheung HK$ 2,046,000 with interest, which the Court of Appeal (**CA**) calculated as the value of the options.

Facts

Mr Cheung's employment contract contained the following clause 8:

"Share option: Our company agrees, after expiration of the probation, to accept the Employee's internal subscription for share options issued by the Company, the number of the shares is 600,000, The offering price is subject to Listing Rules of SEHK and approval of the board of directors, at the same time to be processed according to the unified regulations of the Company. Such share options are personal beneficial interests."

After the expiry of Mr Cheung's probation period, TD did not offer any options to Mr Cheung. After Mr Cheung's employment terminated in November 2010, he brought proceedings against TD alleging a breach of his employment contract and claiming damages. Mr Cheung was successful in claiming damages of HK$ 2,046,000 in the Labour Tribunal. TD appealed to the Court of Appeal.

TD argued that:

- the wording "according to the unified regulations of the Company" in clause 8 had the effect of importing the entirety of the company's Share Option Scheme (**Scheme**), including provisions which stated that directors had discretion as to whether to offer an option; and
- the Labour Tribunal's valuation of the share options was incorrect.

Decision

The Court of Appeal dismissed the appeal and held:

- In Clause 8 TD clearly agreed to accept Mr Cheung's subscription for share options. TD subsequently failed to give Mr Cheung the opportunity to subscribe for share options. The reference to unified regulations relates to procedural elements of the Scheme such as fixing of the price, format of the offer etc.
- The valuation of the share option reached by the Labour Tribunal was correct. The Labour Tribunal calculated the share option price by taking the exercise price on the day that Mr Cheung would have been offered the shares (on or shortly after completion of his probation) and the value of the option on or shortly before the date of termination of employment. The Court of Appeal confirmed that this it was reasonable to presume that Mr Cheung would have exercised his option and realised his shares around or shortly before he left TD.

Takeaway points

We recommend employers who intend share options or other benefits to be provided at their discretion include clear and unambiguous language in the employment contract to that effect.

Contract amendment case goes back to Tribunal

Wu Kit Man v Dragonway Group Holdings Limited (2018)

In June 2017 the Court of First Instance (**CFI**) held that an addendum, which amended an employee's contract to require the employer to pay the employee a bonus of HK$ 350,000, was void. The CFI held the addendum was only beneficial to the employee and the employee had provided insufficient consideration for the addendum to be binding. See our previous alert on the case here. The employee has successfully appealed the CFI's decision and the matter will be sent back to the Labour Tribunal for a retrial.

Background

Ms Wu was hired by Dragonway Group Holdings Limited (**Dragonway**) in May 2015 to assist with preparing Dragonway for listing on the Hong Kong Stock Exchange. In October 2015, the parties signed an addendum stating that:

"If the Company or its holding company ceased the listing plan or you leave the Company for whatever reason before 31 December 2016, a cash bonus of HK$ 350,000 will be offered to you within 10 days after the cessation or termination and in any event no later than 31 December 2016."

After Ms Wu left Dragonway, there was a dispute as to whether she was entitled to her HK$ 350,000 cash bonus. The Labour Tribunal held that the addendum was enforceable and ordered Dragonway to pay Ms Wu her bonus.

CFI Decision

Dragonway successfully appealed the decision in the CFI, on the basis that the addendum lacked consideration and therefore was not a valid contract. The CFI held that the addendum which granted Ms Wu the right to receive the bonus did not require Ms Wu to fulfil any further conditions to receive the bonus, it only required her to continue to carry out her existing role which was to assist with preparing Dragonway for listing. On that basis, the addendum lacked consideration and was invalid. The Court ordered Ms Wu to repay the cash bonus of HK$ 350,000.

CA Decision

Ms Wu appealed to the Court of Appeal (**CA**). The CA held that several issues around consideration which required further investigation had not been sufficiently brought to the Labour Tribunal's attention.

Ms Wu argued in the CA that an employee choosing not to exercise his or her right to terminate his or her employment contract could be good consideration for the variation of the terms of employment, notwithstanding that the employee was performing the same obligations as before. This argument and supporting case law had not been raised in the initial Labour Tribunal proceedings.

The CA noted that whilst deciding on the issue of consideration, a tribunal or court must still have regard to the overall circumstances of the case to see whether the continuance of employment did provide a real benefit to the employer which can provide consideration for the variation. Allegations made by Dragonway that Ms Wu's performance was unsatisfactory also warranted further investigation, as the Labour Tribunal had not properly considered the employment relationship between Ms Wu and Dragonway. On this basis, the CA held that the case be remitted to the Labour Tribunal for a retrial on the question of consideration.

Legislative Developments

Employment (Amendment) Bill 2018

Employees will have to wait longer than expected for any right to reinstatement or reengagement, as progress slows on the Employment (Amendment) Bill 2018 (**Bill**). The Bill, if approved, would allow the Labour Tribunal to make an order for reinstatement or re-engagement of an employee who has been unreasonably and unlawfully dismissed without the need to first secure the employer's agreement. Currently reinstatement or reengagement following unreasonable and unlawful dismissal is only possible with agreement from both the employer and the employee.

The Bill was due to have its second reading “resumed” in January 2018. In Hong Kong, a Bill has three readings before it becomes law. The Bill was introduced to the Legislative Council in May 2017 and discussed by the Bills Committee in October and November 2017. Further amendments were

recently proposed by a Legislative Council member which require government consideration, but there is no indication of how long that process will take.

These latest developments give employers more time for to plan for the Bill's proposed changes, which could present difficulties for employers trying to terminate problematic employees. See our previous alert here for further detail on the Bill.

Paternity Leave

The government has proposed to increase paternity leave from 3 to 5 days. Chief Executive, Carrie Lam, made this commitment in her October 2017 Policy Address, and confirmed that the Labour Welfare Board had already completed their review of paternity leave. Recent reports suggest the Labour Advisory Board supported the recommendations and a bill on paternity leave will be submitted to the Legislative Council's manpower panel for discussion in the next few months. The bill is expected to be passed quickly, and employees will likely benefit from extended paternity leave from summer 2018.

Maternity Leave

The government will commence a study on improving maternity leave, aiming to increase maternity leave from 10 to 14 weeks. This commitment was first made in Carrie Lam's October 2017 Policy Address and recently reiterated by Chief Secretary Michael Cheung. There is no proposed timeline for implementing the changes but it is unlikely they will happen in 2018.

Statutory Minimum Wage review begins

The Minimum Wage Commission has begun its yearly consultation on the Statutory Minimum Wage. For six weeks the Minimum Wage Commission will consider views from the public and various stakeholders before making recommendations to the government. Any changes to the Statutory Minimum Wage will come into effect from 1 May 2018.

Government announces preliminary proposal on the abolition of MPF offsetting

On 29 March 2018, the Government announced that in private meetings with business and labour representatives, a preliminary proposal on how to abolish Mandatory Provident Fund offsetting had been discussed. Under the current offsetting arrangement, an employer can offset a statutory severance payment or long service payment made in respect of an employee against accrued benefits attributable to the employer's contributions. For more information, see our alert here.

Immigration update: speaker/presenter exception for foreign visitors

The Immigration Department recently expanded the scope of permitted business-related activities for foreign visitors to include an exception for speakers/presenters.

A foreign visitor (**speaker**) may now attend an event to deliver a speech or presentation subject to three conditions without obtaining a visa. If any one of the following conditions is not met, an employment visa will be required:

- the speaker will not be remunerated (either locally or overseas) for speaking/presenting at the event (except the provision of accommodation, passage, meals relating to the event, or the reimbursement of such expenses);
- the duration of the event (not the speaker's length of stay) will not be longer than seven days; and
- the speaker will only attend one single event to deliver speeches/presentations during each period of permitted stay for the same group of attendees. A single event can last more than one day. This condition will not be met if the speaker will present at different locations during the same trip, even if the presentations are on the same subject matter.

If the conditions are not met, the responsibility to obtain an employment visa ultimately lies with the speaker, who would usually be sponsored by the Hong Kong event organiser.

Takeaway points

- The new speaker/presenter exceptions may be useful for companies engaging foreign visitors to speak at events but there are strict requirements to comply with.
- Some companies may struggle to find payment structures that meet the no remuneration requirement. Please contact us if you need advice on any aspect of this.

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